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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 233.

ELMIRA KNEPPER, APPELLANT,

vs.

JOHN A. SANDS, APPELLEE.

On a Certificate of Questions Propounded by the Court of Appeals of the Eighth Circuit of the United States.

I. S. STRUBLE, *Attorney for Appellant.*
KING & STEARNS, *Attorneys for Appellee.*
M. B. DAVIS, *of Counsel for Appellee.*

APPELLEE'S BRIEF AND ARGUMENT.

On the 18th day of March, 1901, complainant filed his bill in equity in the United States Circuit Court, in and for the northern district of Iowa, against Elmira Knepper, respondent, in which he alleges that for many years after the adjustment, resumption and forfeiture of the grant for May 12, 1864, to the Sioux City and St. Paul Railroad Company,

by an act of the Iowa legislature and the offices of the state and the relinquishment of the land in question by the legisture of the state of Iowa to the general government, the land remained open, unoccupied and unappropriated public land, and that more than three years after this resumption act, and more than one year after the relinquishment act, and in 1884, complainant herein settled upon said land with the open and declared purpose of taking said land as a homestead, to-wit: the northwest quarter of section 9, township 49, range 42, O'Brien county, Iowa, and did erect thereon a house, and break and cultivate and fence said land, putting improvements thereon of the value of $1,750, and that he has ever since resided thereon, claiming said land as his home, under the homestead laws of the United States.

That on the 18th day of November, 1885, the secretary of the interior issued a proclamation or notice and instructions relating to the entry of said land, among other lands; that on March 10, 1896, complainant appeared at the local land office at Des Moines, Iowa, and tendered his homestead filing for said land, alleging his residence and cultivation of said land, and legal qualifications to make said entry, all in full compliance with law, and tendered legal and proper fees and homestead filing therefor, which filing and tender of fees the land office held in abeyance pending a trial and examination of the rights of all parties concerned, including the claim of respondent, Elmira Knepper, to purchase said land under and by virtue of an alleged contract of sale made with the Sioux City and St. Paul Railroad Company to Elmira Knepper.

On the 21st day of June, 1887, the respondent claiming the right by reason of said contract to purchase the same under and by virtue of the fourth section of an act approved March 3, 1887, even as against the homestead and settle-

ment rights of complainant herein, though respondent had never resided upon said land or cultivated the same or in any manner attempted to comply with the homestead and settlement laws of the United States for obtaining government land; that upon hearing thereon before the register and receiver a decision was rendered in favor of complainant awarding him the land under his homestead entry. Respondent appealed therefrom to the commissioner of the general land office, which decision of the register and receiver was affirmed by that officer. Respondent further appealed from the decision of the commissioner to the secretary of the interior, who reversed the decision of the register and receiver, and of the honorable commissioner.

This action was brought to reverse the decision of the secretary of the interior, and for a decree, cancelling and declaring void the patent issued to Elmira Knepper. The respondent filed a general demurrer to the bill, which was overruled; the respondent declining to further plead a decree was rendered in favor of complainant, setting aside and cancelling the patent issued by the secretary of the interior to Elmira Knepper, and quieting the title in John Sands, respondent herein. From this decision respondent appealed to the United States Circuit Court of Appeals. This cause is not before the court upon the grounds upon which it was placed in argument by counsel for respondent upon the general demurrer to the bill. Only two questions have been certified to this court by the United States Circuit Court of Appeals. The demurrer admits the facts and refers the law arising thereon to this court. The first question certified to this court involves the construction of an act of congress approved May 12, 1864, granting certain lands to the state of Iowa for the purpose of aiding in the construction of a railroad from Sioux City, in said state, to the south line of the

state of Minnesota, also to said state for the use and benefit of the McGregor Western Railroad Company for the purpose of aiding in the construction of a railroad from South McGregor in a westerly direction until it shall intercept the said road running from Sioux City to the Minnesota state line, in the county of O'Brien. Also an act of the general assembly of the State of Iowa, entitled, "An act to resume all the lands and rights conferred upon the Sioux City and St. Paul Railroad Company, by or under an act of congress, approved May 12, 1864, to lands not heretofore earned by said company." Approved March 16, 1882. The acts referred to are set out on pages 1 to 4 of the record.

Appellee contends that by an act of the general assembly approved March 16, 1882, resuming the" lands not heretofore earned by said company" was a full, complete and final adjustment of the grant so far as the said Sioux City and St. Paul Railroad Company was concerned. The land in controversy is within the ten-mile limit of said grant, and a part of the land patented to the State of Iowa for the use and benefit of the Sioux City and St. Paul Railroad Company, and withheld from the company by the state for the reason that the state had conveyed to the company all of the lands to which it was entitled under the provisions of the granting act, for constructing five sections or fifty miles of said road.

The State of Iowa accepted the grant by an act of the general assembly, approved April 3, 1866, and by the same act conferred upon the Sioux City and St. Paul Railroad Company so much of the lands as may be granted and conferred under the provisions of the said act of congress, for the purpose of aiding in the construction of a railroad from Sioux City, Iowa, to the south line of the State of Minnesota.

By another act of the general assembly of the State of

Iowa, approved April 20, 1856, the State of Iowa accepted the said grant and trust conferred upon the state by an act of congress approved May 12, 1864, to aid in the construction of a railroad in said state, upon the conditions and restrictions contained in the said act of congress.

Section 2 of said act provides: "Whenever any lands shall be patented to the State of Iowa in accordance with the provisions of said act of congress, said lands shall be held by the state in trust for the benefit of the railroad company entitled to the same by virtue of said act of congress, and to be deeded to said railroad company as shall be ordered by the legislature of the State of Iowa."

September 19, 1866, the Sioux City and St. Paul Railroad Company duly accepted said grant, and on the 20th day of September, 1866, filed in the office of the secretary of Iowa evidence of such acceptance. July 10th, 1867, the Sioux City and St. Paul Railroad Company filed in the office of the secretary of the State of Iowa a map of definite location of said road, and a certified copy of same was filed in the department of the interior July 17, 1867.

In 1872 the company began the construction of the road from a point on the south line of the State of Minnesota to Lemars, in Plymouth county, Iowa, to a connection with the Iowa Falls and Sioux City Railroad, now owned and operated by the Illinois Central Railroad Company, and completed it early in 1873, the length of the constructed line being 56.13 miles.

July 26, 1872, the governor of the State of Iowa certified to the secretary of the interior, as provided by section 4 of the act of May 12, 1864, to the completion of two sections or twenty miles of road from the Minnesota state line, and on the 10th day of August, 1872, duly certified to the further construction of another section of ten miles, and on

the 4th day of February, 1873, also certified to the further construction of two sections or twenty miles of road, in all five sections, being fifty continuous miles of constructed road, from the south line of the State of Minnesota in the direction of Sioux City.

The company also constructed 6.13 miles of road in addition to the said five sections.

The secretary of the interior patented to the State of Iowa, for the use and benefit of the Sioux City and St. Paul Railroad Company, 407,910.21 acres of land (less 40 acres twice patented), as follows:

October 16, 1872	191,464.04
June 17, 1873	205,374.76
January 25, 1875	10,911.41
June 4, 1877	160
	407,910.21
	40
	407,870.21

Of which 212,067.66 acres is within the granted ten-mile limits, and 195,842.55 acres is within the indemnity or twenty-mile limit.

The state certified to the Sioux City and St. Paul Railroad Company, as inuring to it under the grant for the construction of five sections, 322,412.81 acres, 186,186.77 acres being within the granted limit and 136,226.04 acres within the indemnity limits. Of the lands certified to the Sioux City and St. Paul Railroad Company within the granted limits, there was lost to said company, in an action wherein the Chicago, Milwaukee and St. Paul Railway Company was plaintiff and the Sioux City and St. Paul Railroad Company was defendant, which was an action to determine the interest of the parties to the lands within the overlapping limits

of the grant, 14,640.06, leaving 171,546.71 acres. There was also lost to the same company in same action, within the indemnity limits, 27,047.46, leaving 109,178.58 acres, making the total of lands lost to the Sioux City and St. Paul Railroad Company, which had been certified to the company by the State of Iowa, 41,687.52 acres; so that there remained to the Sioux City and St. Paul Railroad Company, of the lands certified to it, 280,725.29 acres. As before stated, the Sioux City and St Paul Railroad Company accepted said grant on the 20th day of September, 1866, but having failed to complete the road from Sioux City to Lemars the general assembly of the State of Iowa, by an act approved March 16, 1882, entitled "An act to resume all the lands and rights conferred upon the Sioux City and St. Paul Railroad Company, by or under the act of congress approved May 12, 1864, to the lands not heretofore earned by said company," thereby resuming to itself the title to all of the unearned lands.

Section 1 of said act is as follows: "That all lands and rights to lands, granted or intended to be granted to the Sioux City and St. Paul Railroad Company by said act of congress and of the general assembly of the State of Iowa, which have not been earned by said railroad company by a compliance with the conditions of said grant, be and the same are hereby absolutely and entirely resumed by the State of Iowa, and that the same are absolutely vested in said state as if the same had never been granted to said railroad company." Approved March 16, 1882.

And thereafter the legislature of the State of Iowa, in order to reinvest the title to all the lands in the United States that had not been certified to the Sioux City and St. Paul Railroad Company by an act approved March 27, 1884, authorized and directed the governor of the State of Iowa to

certify to the secretary of the interior all lands which had been patented to the State of Iowa to aid in the construction of said railroad, and which have not been patented by the state to the Sioux City and St. Paul Railroad Company, not including the lands situated in the counties of Dickinson and O'Brien.

And in compliance with the said act of the legislature of the State of Iowa, William Larrabee, the then governor of Iowa, executed a deed of conveyance to the United States, dated January 12, 1887, conveying all the lands then held by the state, not including the lands situated in the counties of Dickinson and O'Brien, amounting to 26,017.33 acres.

At this time the secretary of the interior had patented to the State of Iowa		407,870.21
Of this amount the state had conveyed to the company		322,412.81
Leaving in the state		85,457.40
Of this amount there had been decreed to the Milwaukee Company	37,747.89	
Reconveyed to the United States	26,017.33	63,765.22
The state retaining title to		21,698.18

In Jannary, 1887, an application was filed in the department of the interior in behalf of certain settlers in O'Brien county, requesting suit be commenced and prosecuted in the name of the United States, to assert title to lands in O'Brien county claimed by the Sioux City and St. Paul Railroad Company and the Chicago, Milwaukee and St. Paul Railway Company, under and by virtue of a grant to the State of Iowa, by act of congress approved May 12, 1864, averring that they, the said applicants, are settlers upon said land, and that they are seeking to acquire title to the same under the settlement laws of the United States. Acting upon said application the secretary of the interior made a decision

thereon July 26, 1887, in which he directed the honorable commissioner to make a "complete adjustment of the grant in accordance with the views expressed in his decision, and make a demand upon the Sioux City and St. Paul Railroad Company, and upon the State of Iowa, for the relinquishment and reconveyance to the United States for 17,580.30 acres, or such quantity as the completed adjustment in accordance with the principles by him enunciated will show to be wrongfully held by the state under patents from the United States." (6 U. S. Land Dec. 51.)

August 11th, 1887, the honorable commissioner completed the adjustment as directed by the secretary of the interior and forwarded same to the Hon. Wm. Larrabee, governor of the State of Iowa, in which he found that of the 85,457.40 acres patented to the state but withheld from the company, 26,017.33 acres had been reconveyed to the United States and ordered restored to market, and 37,747.89 acres had been awarded to the Chicago, Milwaukee and St. Paul Railway Company by a decision of the supreme court, leaving 21,692.18 acres still withheld by the state, and requested the governor to reconvey to the United States this 21,692.18 acres, with a further notice that upon failure to make a reconveyance within ninety days a suit would be instituted for the recovery of the land.

The governor of the State of Iowa, having failed to reconvey to the United States the land withheld by the state, a suit was commenced in the circuit court of the United States at the October term, 1889, in which the United States of America was plaintiff and the Sioux City and St. Paul Railroad Company et al. were defendants, for the purpose of recovering the title to the lands thus held by the State of Iowa, by conveyance from the United States for the use and benefit of the Sioux City and St. Paul Railroad Company.

Later the Chicago, Milwaukee and St. Paul Railway Company and the settlers upon the land filed cross-bills setting forth their claims to the land.

June 1st, 1891, a decree was entered in said court quieting the title in complainant, the United States of America, to the lands described, amounting to 21,979.85 acres, as against the defendant, the Chicago, Milwaukee and St. Paul Railway Company, and that said defendant be forever barred and estopped to have and assert any right, title or interest to the lands adverse to the title of plaintiff; that the cross-bill of the settlers be dismissed without prejudice.

The Sioux City and St. Paul Railroad Company and the Chicago, Milwaukee and St. Paul Railway Company perfected an appeal to the Supreme Court of the United States, from the decision of the circuit court, which was affirmed October 21, 1895.

The first question presented for the consideration of the court in the order stated, is: "In view of the provisions of the act of congress of May 12, 1864, by virtue of which the land in controversy was granted to the State of Iowa, did the action which was subsequently taken in manner and form aforsaid, by the governor and legislature of the State of Iowa, operate as a final adjustment of the grant so far as the Sioux City and St. Paul Railroad Company was concerned, and by virtue of its being so adjusted, exempt, or except the grant in question from the provisions of the adjustment act of March 3, 1887?" The purpose of the grant was for the purpose of aiding the State of Iowa in the construction of a railroad from Sioux City, Iowa, to the south line of the State of Minnesota. The grant is for every alternate section of land designated by odd numbers for ten sections in width on each side of said road, and including the usual provisions for indemnity lands; and further provides

that when the governor of the state shall certify to the secretary of the interior to the construction of ten consecutive miles of road, the secretary shall issue to the state, patents for one hundred sections of land for the benefit of the company, and so on from time to time as sections of the road are constructed until the said road has been completed, when the whole of the land granted shall be patented to the state for the use and benefit of the railroad company; and further provides that if the said road is not completed within ten years from the acceptance of the grant, the lands granted and not patented shall revert to the State of Iowa for the purpose of securing the completion of said road within such time not to exceed five years, and upon such terms as the state shall determine, with the further provision that the said lands shall not in any manner be disposed of or encumbered except as the same are patented under the provisions of said act, and should the state fail to complete said road within five years after the ten years aforesaid, then the lands undisposed of shall revert to the United States.

It appears from the certificate (page 3) that on April 3, 1866, the State of Iowa accepted said grant, and on the same day, by appropriate legislative action, ~~confirmed~~ confers that part of the grant made in aid of the construction of a railroad from Sioux City to the south line of the State of Minnesota upon the Sioux City and St. Paul Railroad Company, said grant being made upon the terms, conditions and restrictions contained in an act of congress of May 12, 1864; that the said railroad company accepted said grant from the state and entered upon the construction of the road, but only completed five sections of ten miles each, extending from the Minnesota state line southward to the town of Lemars, and received from the State of Iowa the amount it was entitled to by reason of the construction of such part of its road; that in a

message to the legislature of the State of Iowa, delivered in January, 1882, the governor of the state directed the attention of the legislature to the fact that the railroad company aforesaid had failed to complete its road in accordance with the terms of the grant and advised the legislature of his refusal to convey any more lands to said railroad company, because it had received all the land it was entitled to, and recommended that appropriate legislative action be taken. Following this, and on March 16, 1882, the legislature of the State of Iowa resumed to itself all of the said unearned lands.

Can there be any question but what the title to the lands granted to the State of Iowa for the use and benefit of the Sioux City and St. Paul Railroad Company, and withheld by the state revested in the State of Iowa after the resumption act of March 16, 1882; if so, how can the act of March 3, 1887, apply?

What was the purpose and object of the act of March 3, 1887?

The title of the act is as follows: "An act to provide for the adjustment of the land grants made by congress to aid in the construction of railroads, and for the purpose of forfeiture of unearned lands, and for other purposes."

The enacting clause is as follows: "Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the secretary of the interior be and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the supreme court, each of the land grants made by congress to aid in the construction of railroads heretofore unadjusted."

Our contention is, that the grant was fully and completely adjusted by the resumption act of the general assembly of the State of Iowa, approved March 16, 1882. The

granting act provides (sec. 6, Act 1864): "Provided further, that if the said roads are not completed within ten years from their several acceptance of this grant, that said lands hereby granted and not patented shall revert to the State of Iowa, for the purpose of securing the completion of said roads within such time not to exceed five years, and upon such terms as the state shall determine; and provided further, * * * and should the state fail to complete said road within five years after the ten years aforesaid, then the said lands undisposed of shall revert to the United States."

The disposition of the lands granted to the state under the act of May 12, 1864, was, by the terms and conditions of the grant, left to the state. Section 3 of said act provides: "That the lands hereby granted shall be subject to the disposal of the legislature of Iowa for the purposes aforesaid and no other." Section 4 provides: "When the governor of the state shall certify to the secretary of the interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial and workmanlike manner, the secretary shall issue to the state patents for one hundred sections of land, for the benefit of the road having completed the ten miles, and so on, from time to time, as other sections have been completed." The Sioux City and St. Paul Railroad Company having completed only five sections of ten miles each, would, under the terms and conditions of the grant, be entitled to five hundred sections of land, or 320,000 acres.

Any conveyance of land in excess of this amount would be absolutely void.

The act referred to provides that the company accepting the grant of lands shall take the same with the conditions imposed and the terms provided in the act.

The act of the legislature of Iowa, approved April 3, 1866, also accepted said grant and the trust conferred upon the

state by the act of congress, approved May 12, 1864, to aid in the construction of a railroad in said state upon the conditions and restrictions contained in said act of congress.

It will be seen that the grant was accepted by the legislature upon the *terms, conditions and restrictions* contained in said act of congress.

We have shown that the total amount of land that could be patented to the state for constructing five sections is 320,000 acres; yet it appears that the secretary of the interior patented to the state 407,870.21 acres. Of this amount the state conveyed to the Sioux City and St. Paul Railroad Company 322,412 31 acres, 2,412.81 acres more than the company was entitled to.

"A conveyance of land in excess of the lands earned is void."

Jackson L. & S. R. Co. vs. Davidson, 32 N. W. Rep. 73.
Farnsworth vs. Minn. & Pac. R. R. Co. 92 U. S. 49.

In the latter case the court said: "Where congress makes the construction of portions of a railroad a condition precedent to a conveyance of any other parcel by the state, no conveyance in disregard of these conditions could pass any title to the company."

The court further says: "The evident intention of congress was to secure the proceeds of the land for the work designed, and to prevent any alienation in advance of the construction of the road, with the exception of 120 sections. The act made the construction of a portion of the road a condition precedent to any other part of the road."

It was so held in Schulenberg vs. Harriman, 21st Wall. 44: "Where we had occasion to consider provisions of statute identical with the terms of the one before us."

To the same effect is the case of United States vs. Childers, 12th Fed. Rep. 586.

The grant to the State of Iowa approved May 12, 1864, is unlike any other grant. The grant provides "that if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the State of Iowa."

This is the only grant of congress that provides for a forfeiture and resumption by the state, in case of a non-compliance with the terms and conditions of the granting act.

In all other grants of congress there is no provision in the granting act for reversion to the state, in case of a non-compliance with the conditions imposed by the grant. On the contrary, all other acts provide that the land shall, in case of forfeiture, revert to the United States.

The state accepted the grant April 3, and again April 20, 1866, and by the same acts conferred the lands granted upon the Sioux City and St. Paul Railroad Company. The state accepted the grant of May 12, 1864, upon the terms, conditions and restrictions contained in said act of congress.

The language of the granting act is "that there be and is hereby granted to the state of Iowa," etc. The language employed in all other grants of congrees is not the same as in the act of congress of May 12, 1864. In the former the acts provide that in case of non-compliance with the terms and conditions of the grant that the unearned lands shall revert to the United States; in the latter the act provides that the lands shall revert to the state. Under the act referred to the title to the lands, under the grant, passed to the state. In neither case would the lands revert to the United States or the state by reason of a failure to perform the conditions subsequent. The legal and equitable title would remain in the grantees until a forfeiture has been asserted.

In the case of Francoeur vs. Newhouse, reported in 40th Fed. 618, the court says: "It has been so often decided that

the grant to the railroad company under this, and similar acts, is a grant in praesenti, passing and vesting a present title, only to be defeated by a failure to perform the conditions subsequent, *and suitable judicial proceedings on the part of the United States, to forfeit them*, that it is only necessary to cite the authorities without further discussing the question. Railroad Company vs. Railroad Company, 97 U. S. 496; Schulenberg vs. Harriman, 21 Wall. 44; Van Wick vs. Knevals, 106 U. S. 360, 1 Sup. Ct. Rep. 336. 'There be and is hereby granted' are words of absolute donation, and import a grant in praesenti. This court has held that they can have no other meaning. Railroad Co. vs. U. S. 92 U. S. 741; Wright vs. Roseberry, 121 U. S. 500, 7 Sup. Ct. Rep. 985; Railroad Company vs. Orton, and case cited, 6 Sawy. 198. Mr. Justice Field went over the subject fully in Denny vs. Dodson, 13 Sawy. 32 Fed. Rep. 899, in which he held that not merely the equitable title to the land passed by the legislative grant in praesenti, in such sense that an action of ejectment could be maintained upon it—that the patent provided for was not necessary to pass the title, but was only a convenient instrument of evidence, citing a passage from the opinion of the supreme court in Langdeau vs. Hanes, 21 Wall. 521."

In the case of VanWick vs. Knevals, supra, which is an action to determine the rights of parties to lands within the limits of a grant of congress to the St. Joseph and Denver City Railroad Company, approved July 30, 1866, the court says: "The grant is one in praesenti, except as its operation is affected by that condition; that is, it imports the transfer, subject to the limitations mentioned, of a present interest in the lands designated. The difficulty in immediately giving full operation to it arises from the fact that the sections designated as granted are incapable of identifi-

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cation until the route of the road is 'definitely fixed.' When that route is thus established the grant takes effect upon the sections by relation as of the date of the act of congress. In that sense we say that the grant is one in praesenti. It cuts off all claims, other than those mentioned, to any portion of the lands from the date of the act, and passes the title as fully as though the sections had been capable of identification. Nor is this operation of the grant affected by the fact that patents of the United States are subsequently, upon the certificate of the governor, to be issued by the secretary of the interior directly to the company and not to the state. This is only a mode of divesting the state of her trust character and of passing the legal title held by her to the party for whose benefit the grant was made. The legal title under the grant goes to the state, but the equitable title vests in the company. The state cannot dispose of the lands; she simply holds them for the use and benefit of the company, the act of congress providing how her trust shall be discharged and the legal title be conveyed to the company. The act says that the land granted 'shall inure to the benefit of the said company as follows,' and then proceeds to declare that when the governor of the state shall certify that a section of the road of ten consecutive miles is completed 'in a good, substantial and permanent manner as a first-class railroad,' the secretary of the interior shall issue to the company patents for the sections of land which are opposite and coterminus with the completed road, and that similar patents shall issue upon a like certificate upon the completion of every successive section of ten miles. It matters not, so far as subsequent settlers are concerned, in which manner the title, which has passed out of the United States, is transferred to the company from the state."

Failure to complete a railroad according to the condi-

tions of the grant of lands to the company which has already attached can be asserted as a forfeiture of the grant only by the grantor—United States—through judicial proceedings, or through the action of congress.

Where a grant of land and franchises for the construction of a railroad provides for their forfeiture upon failure to perform work within a prescribed time, the forfeiture may be by legislative act, without judicial proceedings.

Farnsworth vs. Minn. & Pac. R. R. Co., 92 U. S. 49.

Lands granted by congress to aid in the construction of railroads do not revert upon conditions broken until a forfeiture has been asserted by the United States, either through judicial proceedings or by some legislative action sufficient to manifest an intention by congress to reassert the title and resume possession.

St. Louis N. M. & S. R. Co. vs. McGee, 115 U. S. 469.

Under the act in controversy the legal title passed to the state, in trust, however, for the use and benefit of the railroad companies. The act provides that upon completion of sections of ten miles each, evidenced by a certificate of the governor of the State of Iowa to the secretary of the interior, that officer shall issue to the state, patents for one hundred sections of land for the benefit of the road having completed ten miles of road.

Section 2, chap. 144, Act of the General Assembly, Session Laws of Iowa, approved April 20, 1866, provides: "Whenever lands shall be patented to the State of Iowa in accordance with the provisions of said act of congress (May 12, 1864), said land shall be held by the state, in trust, for the benefit of the railroad company, as shall be ordered by the legislature of the State of Iowa at its next regular session, or at any session thereafter."

By an act of the 15th general assembly, entitled "An act authorizing and directing the governor to certify to the Sioux City and St. Paul Railroad Company certain lands therein named."

"Sec. 1. That the governor of the State of Iowa be and is hereby authorized and directed to certify to the Sioux City and St. Paul Railroad Company any and all lands which are now held by the State of Iowa, in trust, for the benefit of the said railroad company, in accordance with the provisions of Sec. 2 of Chapter 144, of the laws of the general assembly."

Prior to the passage of said act the secretary of the interior had patented to the State of Iowa, for the use and benefit of the Sioux City and St. Paul Railroad Company, 396,464.04 acres; 76,838.80 acres more than the railroad company was entitled to for the construction of five sections, or fifty miles of road.

We have already shown that patents conveying land in excess of the amount authorized by the act of congress, is void. Of the amount certified to the railroad company, it was found, in a suit between the Milwaukee Company and the Sioux City Company, that the Milwaukee Company was entitled to 41,687.52 acres, leaving to the company 280,-725.29 acres. (117 U. S. 406.)

Of the excess conveyed to the state 37,747.89 acres was, in the suit referred to, decreed to the Milwaukee Company, and 26,017.33 reconveyed by the State of Iowa to the United States, leaving 26,692.18 acres held by the state after said conveyance.

The report of the secretary of state, for 1883, page 94, will verify what has been said with reference to the amount of lands patented by the United States, number of acres certified to the railroad company by the state, and number of

acres withheld from the railroad company, and the amount of lands lost by the Sioux City Company to the Milwaukee Company by decree of the United States court, as well as lands withheld by the state that were found to belong to the Milwaukee Company. This will also appear by the report of the secretary of state for 1887.

Our contention is, that the granting act of May 12, 1864, granting to the State of Iowa, certain lands, for the purpose of aiding in the construction of two lines of road, as therein provided, to be disposed of by the state for the purposes therein set forth, with the proviso that if the said roads are not completed within ten years after their several acceptance, the said land so granted, and not patented, shall revert to the State of Iowa; that the act of the general assembly of the State of Iowa, approved March 16, 1882, declaring a forfeiture by reason of having failed to comply with the terms and conditions of the grant, and resuming the unearned lands, is a full, final, and complete adjustment of the act.

Sec. 1 of said act provides: "that all lands and all right to lands granted or intended to be granted to the Sioux City and St. Paul Railroad Company, by said acts of congress, and the general assembly of the State of Iowa, which have not been earned by said railroad company, in compliance with the conditions of said grant, be and are hereby absolutely vested in said state, as if the same had never been granted to said railroad company."

The secretary of the interior, recognizing the force and effect of the resumption act, that the lands had been resumed by the state, in a letter addressed to the Hon. Buren R. Sherman, governor of Iowa, under date of February 6, 1883, found in the report of the secretary of state, 1883, in which he says: "If there is no authority vested in you or any

officer of the state to reinvest the United States with the legal title to the unearned lands, I urge upon you the propriety of obtaining such authority from the general assembly as early as possible, in order that such lands may be restored to the public domain.

Following this, and by said act of the general assembly of the State of Iowa approved Mar. 27, 1884, "the governor of the state was authorized and directed to certify to the secretary of the interior all lands which have been heretofore patented to the state to aid in the construction of said railroad, and which have not been patented by the state, to the Sioux City and St. Paul Railroad Company, and the list of lands so certified by the governor shall be presumed to be the lands relinquished and conveyed by section one of this act, provided that nothing in this section contained shall be construed to apply to lands situated in the counties of O'Brien and Dickinson."

In the case of the Sioux City and St. Paul Railroad Company vs. United States (159 U. S. 349), the court says:

"Another contention is, that upon the issuing of the patents of 1872 and 1873 to the state, for the use and benefit of the railroad company, the title vested absolutely in the company, and the lands were thereby freed from restraints or alienations, from conditions subsequent, or from liability to forfeiture. In support of this contention reference is made to Bybee vs. Oregon & C. R. R. Co., 139 U. S. 673, 674, 676, 677 (35, 305, 306, 308); Van Wyck vs. Knevals, 106 U. S. 360 (27-201); Wisconsin Cen. R. Co. vs. Price County, 133 U. S. 469 (33, 687); Desert Land Co. vs. Tarpey, 142 U. S. 241 (35-999); St. Paul & P. R. Co. vs. Northern Pac. R. Co., 139 U. S. 1, 6 (35, 77, 79). But these are cases, as an examination of them will show, in which the grant was directly to the railroad company, or in which the act of congress re-

quired that the patents for lands earned should be issued, not to the state for the benefit of the railroad company, but directly to the company itself. In the case now before us the statute directed patents to be issusd to the state for the benefit of the company; *so that, until the state disposed of the lands, the title was in it, as trustee, and not in the railroad company.* Schulenberg vs. Harriman, 86 U. S., 21 Wall. 59 (22, 554); Lake Superior Ship Canal R. & I. Co. vs. Cunningham, 155 U. S. 372 (39, 189). See, also, McGregor & N. R. Co. vs. Brown, 39 Iowa, 655 (Oct. 23, 1874); Sioux City & St. P. R. R. Co. vs. Osceola County, 43 Iowa, 321 (June 5, 1876). In the case last named, the Sioux City company was relieved from the payment of taxes upon some of the lands patented to the state for its benefit, upon the ground that the legal title was in the state, and the lands for that reason were not taxable. The question is altogether different from what it would be if patents for these lands had been issued, or if the state had conveyed them directly to that company."

Can there be any question but that the title to the land from and after the passage of the act of March 16, 1882, was in the State of Iowa as absolutely as if the same had never been granted to said company?

We desire at this time to call the attention of the court to the provisions of the act of congress of March 3, 1887 (24 St., 556), and the decisions of the secretary of the interior in construing this act.

The first section directs that all railroad land grants, heretofore unadjusted, shall be adjusted without unnecessary delay.

The second section provides for the recovery by the United States of title to lands which, from any cause, have been erroneously certified or patented to, or for the use or

benefit of any company, on account of a railroad grant, whenever the fact may be ascertained that a certificate or patent has been erroneously issued, and prescribed the duties of the secretary of the interior and attorney general in connection therewith.

The third section provides that if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously cancelled on account of any railroad grant or the withdrawal of public lands from market, such settler, upon application shall be reinstated in all his rights, and allowed to perfect his entry by complying with the public land laws, provided that he has not located another claim, or made an entry in lieu of the one so erroneously cancelled; and provided, also, that he did not voluntarily abandon said original entry.

"Sec 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented, as aforesaid, and which have been sold, by the grantee company, to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons, so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase, at the proper land office, within such time, and under such rules, as may be prescribed by the secretary of the interior, after the grants, respectively, shall have been adjusted; and patents to the United States shall issue therefor, and shall revert back to the date of the original certification or patenting, and the secretary of the interior, on behalf of the United States, shall demand payment from the company, which has so disposed of such lands, of an amount equal to the government price of similar lands; and in case of neglect or refusal of said company to make payments, as hereafter

specified, within ninety days after the demand shall have been made, the attorney general shall cause suit or suits to be brought against such company for the said amount. Provided, that nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified or patented as aforesaid, from recovering the purchase money therefor, from the grantee company, less the amount paid to the United States by such company, as by this act required."

"Sec. 5. That when any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to, or for the use of such company, said lands being the numbered sections prescribed in the grant, and being co-terminus with the constructed parts of said road, and where the lands so sold are, for any reason, exempted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof, from said company, to make payment to the United States for said lands, at the ordinary government price for like land, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns. Provided, that all lands shall be exempted from the provisions of this section, which at the date of such sale were in the bona fide occupation of adverse claimants, under the pre-emption or homestead laws of the United States, and whose claim and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries, and receive patents therefor. Provided, further, that this section shall not apply to lands settled upon subsequent to the first day of December, 1882, by persons claiming to enter the same under settlement laws of the United States, as to which lands the parties claiming the same, as aforesaid, shall be entitled to prove up and enter as in other like cases."

The sixth and seventh sections are not material to the issue.

On the 13th day of February, 1889, the commissioner issued instructions to the register and receiver, for their guidance, as to the construction of the provisions of the act of March 3, 1887. With reference to the construction of the 4th section the commissioner says:

"An applicant for land under this section will be required to publish notice of intention to make proof as in pre-emption and homestead cases, and the proof must show:

"1. That he is, or has declared his intention to become a citizen of the United States.

"2. That he is a bona fide purchaser from the company, or some person claiming title under it, and the character of the instrument conveying the land to him.

"3. The amount of purchase money paid to the company.

"4. What part, if any, of the purchase money paid to the company has been refunded to him, or any person acting as his agent?

"5. Whether he has instituted proceedings against the company for the recovery of any portion of the purchase money; if so, for what portion?

"6. The value and character of the improvements, if any, made or acquired by him, upon the land.

"7. Whether there is any person of the first class, under the third section, entitled to the right of entry, under the pre-emption or homestead laws."

(The person referred to, being of the first class, under the third section, as laid down by the commissioner in his instructions to the register and receiver, is as follows: "First, bona fide settlers, whose homestead or pre-emption entries have been erroneously cancelled, on account of the railroad grant or withdrawal.")

Upon the submission of satisfactory proof, as prescribed above, the register will issue certificates in duplicate—numbered in the regular cash series—with annotations thereon, showing that the entry is allowed, without payment, under the fourth section of the act of March 3, 1887.

Counsel in his argument says: "The first question, and to some extent the second, calls for a construction of an important part of the act of May 12, 1864, and the two acts of the legislature of the State of Iowa designated in the certificate," and further says: "This was a grant of land to the State of Iowa in trust for the purpose of securing through the aid thereby from two railroads. * * * The lands granted were subject to the disposal of the State of Iowa. The manner in which this should be done is fully set forth. This section contains most important provisions which bear forcibly upon the first question." This we may concede. The state could not dispose of any of the lands except in compliance with the provisions of said act. The act provides "That if the said roads are not completed within 10 years from the date of their several acceptances of the grant, the said lands hereby granted and not patented, shall revert to the State of Iowa for the purpose of securing the completion of the said roads within such time not to exceed five years, and upon such terms as the State shall determine."

Counsel further says: "It is apparant that this grant did not contemplate that any of the lands included within its terms shall not be disposed of by the state for any other purpose than the one named herein; that should the state fail to complete said road (after resuming the land referred to in case either company should fail to complete within ten years given in which to complete them or either) then it should have no further power over them." While it is true, the act limits the time in which the road should be completed or a

time in which the company would have to complete the road, yet the lands undisposed of would not revert to the state by operation of law so as to extinguish the equitable title held by the company. Had the company completed the road any time, say within twenty years, the company would be entitled to all of the lands applicable to the grant in the event no forfeiture had been declared, or the lands resumed by the state. In the same way the state would not be limited to the time provided in the act had there not been a declaration of forfeiture by the United States, or judicial proceedings to recover title to the land.

Counsel, further contending, on page 7 of his brief says: "It cannot be shown that in the grant of May 12, 1864, nor in any subsequent act of congress, power was given the State of Iowa to thus assume control of these lands after fifteen years following their acceptance by the Sioux City and St. Paul Company. The state simply attempted to usurp power it did not possess, undoubtedly hoping congress would come to its relief and later give the lands to the state for some approved purpose. This was never done. Now while it may have been proper for the state to ascertain whether the company had received its proper quantity of land so that a further and possibly unearned quantity might not be patented to it by the state, yet this ascertainment of quantity and the fact that the number of the excess of land held by the state was also by the same process ascertained, it does not at all follow that the state did, or had, power to adjust the grant as between the company and the United States." It can hardly be contended that the State of Iowa did not under the provisions of the granting act of May 12, 1864, have the right to resume to itself all of the unearned lands.

We have shown that under the provisions of this grant the secretary of the interior could only patent to the state,

for the use and benefit of the company, the amount of lands provided in this act. It is only a matter of computation. The company built five sections of ten miles each, making fifty miles, and the secretary of the interior could only, under the provisions of the act aforesaid, patent to the state for the use of said company, 320,000 acres. While it is true that the secretary of the interior did inadvertantly patent to the State of Iowa 87,880.21 acres of land in excess of the land authorized by the act, it does not follow that the railroad company acquired any interest or claim to the land in excess of the amount provided in said act.

In the case of St. Louis Iron Mountain & Southern Ry. Co. vs. McGee, 115 U. S. 469, the court, in discussing the question with reference to forfeiture of unearned land, says: "It has often been decided that lands granted by congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to the judgment of office found at common law. United States vs. Repentingny, 5 Wall. 211, 267, 268; Schulenberg vs. Harriman, 21 Wall. 44, 63; Farnsworth vs. Minnesota & Pacific R. R. Co., 92 U. S. 49, 66; M'Micken vs. United States, 97 U. S. 217, 218; Van Wick vs. Knevals, 106 U. S. 360."

We have called the attention of the court to the provisions of the act of 1887, and of the steps necessary to take in order to acquire title to lands from the United States under the provisions of that act. It is evident that at the time of the passage of the act of March 3, 1887, some of the land grants had not been adjusted, and in order that the grants should be finally settled and adjusted congress passed the act referred to. If the grant had been adjusted by the re-

sumption act of March 16, 1882, then the provisions of the act of March 3, 1887, would not apply, and the company could not dispose of any of the lands, and the purchasers from the railroad company could not be deemed good faith purchasers within the meaning of that act.

The first section directs that "All railroad grants heretofore unadjusted shall be adjusted without unnecessary delay." While it is true, as heretofore stated, that on the 12th day of January, 1887, the settlers residing upon the land made application to the secretary of the interior asking that suit be commenced to recover title to the land in controversy, including other lands. At that time the state held the title to 21,692.18 acres, and the commissioner, in completing the adjustment as directed by the commissioner, so found. The adjustment, such as it was, was not made under the provisions of that act. The secretary of the interior directed the commissioner to complete the adjustment "in accordance with the principles herein enunciated," and make demand upon the Sioux City & St. Paul R. R. Co. and upon the State of Iowa for the relinquishment and reconveyance to the United States. As a result of such investigation, the commissioner found that the state withheld 21,692.18 acres, and later the attorney general was directed to bring suit for the recovery of this land. Let us admit, for the sake of the argument, that the grant was unadjusted and subject to adjustment by the secretary of the interior, the only one authorized under the provisions of the act of March 3, 1887, to make the adjustment; we must necessarily conclude that the adjustment was completed on the 11th day of August, 1887.

The suit that was instituted by the United States against the Sioux City and St. Paul Railroad Company was for the purpose of enforcing the adjustment and securing the title to

the 21,692.18 acres in the United States. No one will contend that the legal and equitable title to the land in controversy was in the Sioux City and St. Paul Railroad Company. One of the allegations in the bill filed by the United States against the railroad company is: "That of the lands referred to in Par. 16 hereof, the State of Iowa still holds the legal title to the following described lands, situated in the counties of Dickinson and O'Brien, in the State of Iowa," and then sets out a description of the land, amounting to 21,692.18 acres, and further alleges "that the said State of Iowa is a sovereign state, and under the federal constitution and statutes cannot be sued in this court nor made a party defendant herein with the said Sioux City and St. Paul Railroad Company; but complainant is informed and believes that the said State of Iowa is ready and willing to abide the final determination of this action, and execute said trust in accordance herewith."

In the opinion of the supreme court in this case upon appeal, Justice Harlan makes use of the following language: "The legislature of Iowa, by the act of March 13, 1874, directed the governor to certify to the Sioux City company, in accordance with the provisions of the act of April 20, 1866, any and all lands then held in trust for its benefit." The act, though, only required conveyance of such of the trust lands held by the state as the company was entitled to by virtue of the act of congress.

For this reason, it is suggested, the governor did not convey the 85,457.40 acres that remained after conveying to the company 322,412.81 acres of the 407,870.21. * * "Giving effect to these rules of statutory interpretation, we cannot suppose that congress intended that the railroad company should have the benefit of more lands than it earned. As the lands granted could only be devoted to the

construction of the Sioux City road, from Sioux City to the Minnesota line, and as the state holding the legal title in trust has not disposed of and does not intend to dispose of them for the purpose of completing that part of the road located between Sioux City and Lemars, we perceive no reason why, within the meaning of the act of 1864, these lands may not be regarded as 'undisposed of' and equitably the property of the United States if it be true that the railroad company has received as much of the public lands as it was entitled to have on account of constructed road certified by the governor of the state."

"This was the interpretation placed by the state upon the act of congress, for by the act of the Iowa legislature of March 16, 1882, the state, because of the failure of the Sioux City company to construct any road between Sioux City and Lemars, resumed the title to all lands that had not been 'earned' by the railroad company; by a subsequent statute of March 27, 1884, it relinquished and conveyed to the United States all lands and rights to lands resumed and intended to be resumed by the previous act."

By the second section of the same act the governor was directed to certify to the secretary of the interior, all lands which have not been patented by the state to the company, not including the lands in Dickinson and O'Brien counties. January 12th, 1887, the governor certified to the secretary of the interior 26,017.33 acres in Woodbury and O'Brien counties.

Counsel for appellant says: "This proviso is very significant, for if it had any effect upon the lands in controversy and others in the same condition, the effect was to retain the title thereto, and unless the United States has taken action to recover said lands and has recovered them they remain in

the state, and while the title remains in the state no settler has ever had right of entry upon any of them."

The fact, nevertheless, remains that the title to the lands was in the state at that time, and it is immaterial for the purpose of this case why the lands in Dickinson and O'Brien counties were excepted. By the second section of the act of the general assembly approved March 27, 1884, the state held the legal title to the lands as trustee for the United States. This did not change the character of the lands. They were what is known as "government lands," and as such subject to entry.

Counsel, on page 11 of his brief, refers to the case of Vicksburg S. & P. R. R. Co. vs. Elsmore, 15 Southern, 701. The facts in that case are unlike the facts in this case. In that case the lands were granted by the United States to the State of Louisiana for the use and benefit of the Vicksburg S. & P. R. Co. The time was limited by the grant for the completion of the road to ten years. The defendant, after the expiration of ten years, settled upon the land with a view of taking it as a homestead, and insisted that the lands had reverted to the United States by lapse of time, i. e. that is the ten years; that the legislature of Louisiana had declared the grant forfeited.

The court, in the opinion, says: "It is true the railroad was not completed within the time stipulated in the grant. It is also true, we believe, there was a deviation from the line originally designed for the road. It is equally true the road has been completed and the United States has never insisted on any cause of forfeiture and has never forfeited the grant. From time to time certificates of the completion of the road have been filed in the office of the commissioner of the general land office, and though long after the ten year limit, have been accepted as satisfactory evidence of compliance

with the grant. So long as the grantor interposes no objection, we cannot perceive the right of defendants to urge noncompliance with conditions we must deem waived by the grantor. Nor can we understand how the State of Louisiana can forfeit lands or declare annulled the grant of 1856. The state has no interest. It was the trustee under the act of 1856, but its functions have long since ceased and before the legislative act in which it undertook to annull the grant."

We have shown that all of the unearned lands were resumed by the state by the act of March 16, 1882, and subsequently relinquished to the United States, the result of which was to make a final and complete adjustment of the grant. It is true, the commissioner undertook to make an adjustment under the direction of the secretary of the interior. If, as we contend, the grant was not subject to adjustment under the provisions of the act of March 3, 1887, the fact that the adjustment was made by that officer cannot prejudice appellee in his claim under his homestead entry, or in any way inure to the benefit of appellant.

Counsel, however, insists that the grant was fully adjusted by a decision of the supreme court October 21, 1895. The object of that suit, as declared by the complaint, was to recover title from the railroad company to the lands withheld by the state. The railroad company contended that it was entitled to lands for constructing 6.13 miles of road in addition to the five sections of ten miles each. The company further contended that it was entitled to lands in lieu of those awarded the Milwaukee Company, in the common place limits of the two intersecting roads. Another contention is that upon the issuing of the patents to the state for the use and benefit of the railroad company the title vested absolutely in the company and the lands were thereby freed from

restraints or alienation, from conditions subsequent or from liability to forfeiture.

Other defenses were interposed to which we need not refer. The court, however, found against the company, rendering judgment and decree, quieting the title in the United States to the 21,692.18 acres.

In view of what has been said, we feel confident our position is well taken and should be sustained.

II.

The second question in the certificate is, whether the claim of Elmira Knepper, appellee, as a purchaser of the land in controversy under the provisions of the act of March 3, 1887, is superior to that of John A. Sands, a settler upon the land. The facts as disclosed in the records show that Sands settled upon the land in 1884, with a view of establishing a homestead thereon, that his residence has been continuous since that time, and that he has made improvements thereon of the value of $1,750.

Elmira Knepper entered into a contract with the Sioux City and St. Paul Railroad Company for the purchase of said land June 21, 1887, and in virtue of the provisions of the 4th section of the act of congress, making provision for the adjustment of railroad land grants and other purposes, approved March 3, 1887. Sands renewed his homestead application March 10, 1896, after the secretary of the interior in a published circular of date Nov. 8, 1895, had declared the land subject to disposal by the United States. Elmira Knepper also filed her claim to the land as a good faith purchaser from the railroad company. The contest between the parties thus inaugurated was tried and determined before the register and receiver and resulted in the finding by such officers that Sands, by virtue of his settlement upon the land and

continued residence thereon and cultivation thereof, and in full compliance with the laws of the United States, was entitled to a patent from the United States. Elmira Knepper appealed from such decision to the commissioner of the general land office, and on July 20, 1899, who likewise held that Sands, the appellee, was entitled to a patent for the land. The commissioner in his decision, after reciting the facts, says:

"As to Elmira Knepper and Sands, the 4th section of the act of March 3, 1887, provides relief for those persons who had in good faith purchased land from the railroad companies which had been patented and certified thereto, but which in subsequent proceedings should be found not to be within purview of the grant.

"In the construction of this statute it has been repeatedly ruled by this office that good faith is not manifested where at the time of the purchase the purchaser is aware that the land is settled upon and occupied by one claiming the tract to be public land and is holding it under the public settlement laws with the intention to enter the same should it become subject to entry.

"Now in the case at bar, the testimony clearly proves that Mrs. Elmira Knepper, the purchaser, residing on the adjoining land with her husband, was fully aware that Sands was residing upon the land as early as 1884, had seen him there, had made no objection to his occupancy, so she had personal knowledge of settlement and claim at the time of the purchase."

A further appeal was taken from such decision by Elmira Knepper to the secretary of the interior, who, on April 24, 1900, reversed the decision of the register and receiver and also of the commissioner, and thereupon rejected the application of Sands to enter the land as a homestead.

Following this decision a patent was issued to Elmira Knepper for the land in controversy. The secretary of the interior in his decision says: "There is nothing to show that the purchase was not made in good faith, relying upon the title of the railroad company under the outstanding patent issued for its use and benefit June 17, 1873, long before Sands' settlement upon the tract. The possession of Sands at the time of Mrs. Knepper's purchase is relied upon as making the purchase one in bad faith."

By a recent departmental decision in the case of Towe vs. Manley (29 L. D. 504), it was, in effect, held "that the fact that the land had been settled upon prior to the date of the purchase thereof from the railroad company, but after the patenting of the tract to the state for the use and benefit of the company on the faith of which the purchase was made, there being no entry or other claim to the land at the time of the patenting, does not affect the bona fides of the purchaser or prevent a confirmation of title in the purchaser under section 4 of the act of March 3, 1887. The land was not then subject to entry, having been withdrawn therefrom on account of the grant of the railroad company and the patenting of the land to the state as trustee for the company."

Counsel well says: "The bill makes no charge whatever of fraud against the appellant." The only question that the court is called upon to determine under this branch of the case is whether appellant can maintain her claim to the land under the facts as shown as against appellee's homestead claim. The bill charges that the secretary erred in reversing the commissioner in favor of appellant and patenting the land to her.

Stated in another form: Was it the purpose of congress in providing for the "forfeiture of unearned lands" that be-

longed to the United States to give purchasers from the railroad company preference over actual settlers thereon, claiming the same under the settlement laws of the United States?

Admitting, for the sake of the argument, that the controlling question is, and must necessarily turn upon the construction of section 4. If it was the purpose and intent of congress to cut off all claims of settlement, unless it is shown that these claims were initiated anterior to the date of the patenting of land to the state, and gave to the Sioux City & St. Paul Railroad Company the right to enter into contracts for the sale of these lands, without reference to other claimants at the date of such sale, then, and in that case, the railroad company had the right to dispose of these lands at any time after the passage of this act. If this could be done what was there to prevent the company from immediately after the passage of the act of congress, March 3, 1887, entering into a contract with this party for the sale of the entire tract, to-wit: 21,692.18 acres? All that would be necessary to substantiate his claim would be, according to the decision of the secretary of the interior, to show, or rather a failure on the part of the contesting claimants to show, that his claim to the land was not made prior to the date of the patent to the state. This, in itself, would be conclusive evidence that the lands "which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such at the proper land office." This is the language of the statute: "The person or persons so purchasing in good faith." The only showing necessary to be made of good faith is to show that the party purchasing has entered into a contract with

the company for the purchase of the land. They are not in any way limited to quantity. Any person that can make proof that he holds a contract of purchase from the company is conclusive evidence of good faith upon his part. Appellee is not making claim to the land on homestead or pre-emption entry made prior to the time the lands were patented to the state.

It has always been the policy of the government to hold all government lands for actual settlers, except in cases where grants of congress have been made for the purpose of internal improvements. These lands were included within the grant to the State of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City to the south line of the State of Minnesota. The Sioux City & St. Paul Railroad Company, in effect, entered into a contract with the State of Iowa, to build the road between these two points. The time for the completion of the road was limited in the contract. The company failed to construct the road within the time, and under the terms of the contract forfeited all rights thereunder, and to all the benefits of the terms and conditions of the contract, except so far as to hold whatever amount of lands they had received for the construction of fifty miles of road, which had been patented to it by the state. After this the state resumed all the unearned lands by an act of the legislature approved March 16, 1882, and thus ended the contract. All of the lands enuring to the Sioux City & St. Paul Railroad Company, under the grant of May 12, 1864, had been patented to the company.

In the case of the Sioux City & St. Paul Company vs. United States, supra, it is said: "If the terms of an act of congress, granting public lands, admit of different meanings, one of extension and the other of limitation, they must be

accepted in a sense favorable to the grantor, and if rights claimed under the government be set against it, they must be so clearly defined that there can be no question of the purpose of congress to confer them. Leavenworth, &c., R. R. Co. vs. U. S. 95 U. S. 733-740.

"Acts of this character must receive such construction as will carry out the intent of congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyances. Winona & St. Peter R. R. vs. Barney, 113 U. S. 618-625. Nothing is better settled, this court has said, than that statutes should receive a sensible construction, such as will effectuate the legislative intent, and if possible, so as to avoid an unjust or an absurd conclusion. Lau OW Bew vs. U. S., 114 U. S. 47-59.

"Giving effect to these rules of statutory interpretation, we cannot suppose that congress intended that the railroad company should have the benefit of more lands than it earned."

In Lytte vs. Arkansas, 9 How. 314, speaking of a claim under the pre-emption statute, it is said: "It is founded in an enlightened public policy, rendered necessary by the enterprise of our citizens. The adventurous pioneer, who is found in advance of our settlements, encounters many hardships and not infrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed 160 acres. That this is the national feeling is shown by the course of legislation for many years."

In Clements vs. Warner, 24 How. 396, it is declared that "the policy of the federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become purchasers of a limited extent of land,

comprehending their improvements, over that of any other person."

In Rector vs. Gibbons, 111 U. S. 276, it is said: "Whenever congress has relieved parties from the consequences of defects in their title, its aim has been to protect those who, in good faith, settled upon public land and made improvements thereon. * * There has been in this respect in the whole legislation of the country, a consistent observance of the rules of national right and justice."

In Northern Pacific Railroad vs. Amacker, 175 U. S. 564, we find the statement that "It was long ago said by this court 'that the policy of the federal government in favor of settlers upon the public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person.' Clements vs. Warner, 24 How. 394-397, and in a later case that 'The law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon.' Ard vs. Brandon, 156 U. S. 537."

In Moss vs. Dowman, 176 U. S. 413, the declaration is that "The obvious purpose of the pre-emption and homestead statutes of the United States is to secure to the actual settler the land upon which he has settled, and to give him the prior right to perfect title by purchase or continued occupation."

It must be borne in mind that appellant is not prosecuting this action under a homestead claim or any other government entry. We may admit for the sake of the argument, that the land in controversy was not subject to homestead entry at the time appellee tendered his homestead application in 1884, for the reason that the land was within the limits of the grant of the Sioux City & St. Paul Railroad Company.

If the land was not subject to homestead settlement, not having been formerly opened to entry, appellee would gain nothing by appealing therefrom. Certainly appellant has no cause for complaint. He was not at the time making claim to the land. Had the land at the time been subject to entry, and appellee failed to appeal from the decision of the register and receiver, refusing his entry, and while in this condition appellee had made an entry on the land, the results might have been different.

Counsel in his argument refers to a number of authorities to sustain his position on this point which we do not desire to controvert for the reason that they do not have any application to the case at bar. Counsel's position, briefly stated, is this, that as the land in controversy at the time of Sand's settlement thereon was government land, Sands could acquire no legal or equitable right thereto. We contend, however, that having settled upon the land with a view of taking it as a homestead, believing it to be government land, in so doing he would acquire a settlement right thereon, as was said by the secretary of the interior in Olson vs. Traver et al., (26 L. D. 350): "Whilst, therefore, one who went upon the land and lived thereon and improved the same during the period when the patent was yet outstanding, could gain no rights by such acts, yet if he was there at the time when the land became subject in due order to settlement, and he was otherwise qualified, he would acquire rights which ought to be protected, notwithstanding the fact that he had previously trespassed upon patented land, the land laws providing no penalty for such trespassing.

"It is not needed that decisions be cited for propositions so plain and so well settled as these."

There can be no question but what the land in controversy is a part of the lands patented to the State of Iowa for the use

and benefit of the Sioux City & St. Paul Railroad Company, but was withheld by the state and is included in the decree in the case of the United States vs. The Sioux City and St. Paul Railroad Company, in which it was held that the land belonged to the United States. The next step that was taken by the department of the interior was to open the land to settlement and entry, and in order to accomplish this the honorable commissioner issued a proclamation, under date November 18, 1895, in which he refers to the suit of the United States against the Sioux City & St. Paul Railroad Company for the recovery of title to the land, and a decree quieting the title in the United States, and further says:

"This leaves the title to the lands involved in the suit in the United States and subject to disposal by the department. Therefore, in order to carry their restoration to entry into effect, you will cause to be published for the period of thirty days, in some newspaper of general circulation in the vicinity of the lands, a notice that said lands, a particular description of which will be published with the notice, are restored to the public domain and will be subject to entry on a day to be fixed by the notice, which shall be ninety (90) days from the date of the first publication, and that all persons claiming any part thereof under the act of March 3, 1887 (24 Stat. 556), must come forward within the ninety days immediately following the first publication, and give notice of their claims by publishing their notice of intention to make proof in accordance with the requirements of the circular of February 13, 1889 (8 L. D. 348), upon a day which shall be subsequent to that affixed for the restoration.

"To the end that complications which might arise from the former practice of suspending applications for these lands may be avoided, and the rightful claimants be enabled to acquire title with as little delay as possible, I have to direct

that in the notice of restoration there be inserted a notice to all prior applicants that their applications confer no rights upon them, and that upon the day set by you for restoration, the lands will be open to entry and disposal without regard to such applications, which shall be held by the notice to be rejected.

"That all such applicants may, however, have opportunity to present new applications upon the expiration of the ninety days' notice, you will notify specially all parties shown by your records to have pending applications for these lands, of the rejection thereof, of the date of restoration, and of the necessity of presenting new applications for the protection of their rights.

"In all cases of conflicting claims, you will proceed in accordance with the rules of practice in contest cases.

"A list of the lands to be restored by descriptive subdivisions is enclosed herein."

The order of the commissioner directs that notice of restoration be published. That in the notice of restoration there be inserted a notice to all prior applicants that their applications confer no rights upon them, and shall be held by the notice to be rejected. The object of this notice was for the purpose of "avoiding complications which might arise from the former practice of suspending applications for these lands may be avoided, and the rightful claimants be enabled to acquire title with as little delay as possible."

There can be no question but what the commissioner treated these lands as government land, and subject to disposal by the land department. And in his order for restoration to entry provides that "the notice shall contain a description of the lands, which shall be published with the notice, and restored to public domain, and will be subject to entry on a day to be fixed by the notice." And further pro-

vides how persons claiming any part of the land under the act of March 3, 1887, may assert their claim.

Appellee bases his claim upon his settlement and continuous, uninterrupted possession of the land, in connection with the improvements made thereon, prior to the passage of the act of March 3, 1887, and prior to the date of appellant's purchase from the railroad company.

It will no doubt be admitted that only for the provisions of this act no one holding a contract of sale from the railroad company could acquire a title to lands within the limits of the grant; that fact is conceded by counsel for appellant, for the reason that he bases his claim wholly upon the provisions of the statute, which, according to the construction placed thereon by the secretary of the interior, "there is nothing to show that the purchase (of Knepper's) was not made in good faith, relying upon the title of the railroad company, under the outstanding patent issued for its use and benefit, June 17, 1873, long before Sand's settlement on the tract."

Counsel seems to lose sight of the fact that the land in dispute was government land at the time and before Sands settled thereon; this the court so found in the case of the United States vs. Sioux City & St. Paul R. R. Co., supra. The honorable commissioner took the necessary steps to dispose of the land by issuing the proclamation or notice heretofore referred to. By said notice all claims to the land were cancelled, and all parties making claims to the land were notified to file new applications within the time directed by the notice. Appellant and appellee filed their respective claims to the land. Both parties were seeking to establish their claim under the act of March 3, 1887.

Counsel, however, contends that "Sands' conduct was certainly an abandonment of his first application for permis-

sion to file homestead entry in 1884, and having abandoned his application made in 1884 and presented two thereafter—one in January 21st, 1896, to make proof under the act of March 3, 1887—Sands certainly cannot be held to complain against the decision of the secretary of the interior. He voluntarily appeared in a contest ordered by the commissioner of the general land office and submitted to the hearing of said cause in accordance with said order."

These questions, however, need not be discussed, as they are not involved in the questions raised in the certificate. We will only say in reply, that neither party could secure an adjudication of his claim to the land without complying with the order of the department; it was so understood by appellee and appellant, as they appeared in compliance with said order and made proof of their respective claims.

As heretofore stated, the register and receiver sustained Sands' claim under his settlement entry, which decision was affirmed by the commissioner. This action was brought to set aside this decision. All of the facts and circumstances are fully set out in the bill. Defendant filed a general demurrer to the bill, which was overruled. Defendant failing to further plead, a judgment and decree were entered as prayed.

The secretary, in construing the provisions of the fourth section of the act of 1887, gives it a strict construction, as evidenced by his decision in the Tow-Manley case, wholly ignoring the fact that this is a remedial statute; that the purpose and intent of the statute was to protect the rights and interests of all parties making claim to these lands.

In the case of the United States against the Southern Pacific Railroad Co., supra, the court says: "Section four makes provision for the issue of patents to certain purchasers from railroad companies, providing proof shall be made 'within

such time and under such rules as may be prescribed by the secretary of the interior, after the grants respectively shall have been adjusted.'

"Further, it must be borne in mind that this is a remedial statute, and is to be construed liberally, and so as to effectuate the purpose of congress and secure the relief which was designed, and the mere date of the transaction between the purchaser and the railroad company is not of itself vital in determining whether there is or is not an equity in behalf of the purchaser. As said in Potters Dwarris on Statutes, 231: 'Though a statute gives inaccurate names to things, if the court can discover its meaning it will so expound it as to give force to the intention of the legislature. The sense and spirit of the act, however, are primarily to be regarded in the construction of statutes, and it matters not that the terms used by the legislature in delivering its commands are not the most apt to express its meaning, provided the object be plain and intelligible, and expressed with sufficient distinctness to enable the judge to collect it from any part of the act.'

"The object once understood, judges are so to construe an act as to suppress the mischief or advance the remedy. A remedial act shall be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy. As a general rule a statute ought to be construed liberally. Receiving an equitable or rather a benignant interpretation, the letter of the act will be sometimes enlarged, sometimes restrained, and sometimes, it has been said, the construction made is contrary to the letter, which should be read ultra the letter and confined to ancient statutes."

See, also, the letter of the attorney general to the secretary of the interior, in response to a question as to the true construction of this act (6 L.D. 275): "The whole scope of the law, from the second to the sixth sections inclusive, is reme-

dial. Its intent is to relieve from loss, *settlers and bona fide purchasers*, who, through erroneous or wrongful disposition of the lands in the grant, by the officers of the government or by the railroad, have lost their rights or acquired equities."

All that is required under the provisions of the fourth section, as construed by the secretary, is proof of purchase from the company and payments made thereon. This is conclusive evidence that the purchase was made in good faith.

Let us suppose, by way of illustration, that at the time appellant appeared before the register and receiver, she was the only party appearing and making proof under her contract of purchase. To carry the illustration a little further, let us suppose that all of the claims for these lands were made by contract purchasers from the company, then, under the rulings of the secretary, all that would be necessary on the part of the purchasers would be to make proof of such purchase, and had agreed to pay, and may have paid the contract price, and thus be entitled to a confirmatory patent; and in that way enable the company to indirectly dispose of the land and have the benefit of whatever amount could be obtained from the sale of these lands. The effect of this remedial statute would be far reaching. It would give the company the right to dispose of the lands, which they could not do only for the provisions of this act, and give the purchaser the benefits of this act, by permitting him to acquire title to the land.

In the case at bar, appellant has contracted to pay the railroad company $2,160. Of this amount the government would receive $400, giving the company a clear profit of $1,760 in the transaction; and appellant would receive the benefit of the improvements on the land, which are worth, as found by the secretary, $2,000. This is a fair illustration

of the effect of this remedial statute as construed by the secretary.

For many years congress had been making grants of lands for the purpose of aiding in the construction of railroads. As a result much of the land so granted has been tied up by reason of the failure of the company to comply with the provisions of the grant in not completing the road. While in all the grants of congress provisions are made for a forfeiture of the lands to the United States in the event of failure to complete the road (except in the grant of May 12, 1864, which, as stated, provides for a forfeiture to the state), but in many instances no declaration of forfeiture had been made, so that no disposition could be made of the unearned lands until some steps had been taken to replace the title in the United States. With this end in view congress passed the remedial statute of March 3, 1887.

What could have been the object of congress in adopting this statute? Only for the purpose of reclaiming the unearned lands, and at the same time to do justice to all parties that had acquired an equitable interest in the lands as settlers on the land or as purchasers from the company, and to provide for homestead and pre-emption entries that had been erroneously cancelled. It could not have been in the mind of congress in adopting this act to give the railroad company an opportunity to dispose of the lands, to say to the officers of the railroad companies: while you have no claim or interest in lands you have not earned, yet you may sell the lands, and if it appears that the parties to whom you have made sales are good faith purchasers, they will be given the lands and you may reap the benefits of the sale.

We feel confident that this court will hold that the action taken by the governor and the legislature of the State of Iowa operate as a final adjustment of the grant so as to

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except the grant in question from the provisions of the adjustment act of 1887. To ignore appellee's claim as a settler on the land long prior to appellant's purchase from the railroad company, would be unjust and inequitable, and contrary to law, and we respectfully submit that the first question submitted to this court in the certificate should be answered in the affirmative and the second in the negative.

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M. B. DAVIS,
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